Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of)	
)	
Communications Assistance for)	ET Docket No. 04-295
Law Enforcement Act and)	
Broadband Access and Services)	RM-10865

COMMENTS OF YAHOO! INC.

John Scheibel Vice President Public Policy Yahoo! Inc. 2000 Pennsylvania Avenue NW, 4th Floor Washington, D.C. 20006 (202) 887-6932 John W. Butler Earl W. Comstock Robert K. Magovern SHER & BLACKWELL LLP 1850 M Street NW, Suite 900 Washington, D.C. 20036 (202) 463-2500

Table of Contents

<u>Page</u>
Introduction 1 -
1. The Commission Must Determine What Services Are "Information Services" Under The Statute Before it Can Determine Who is Subject to CALEA Requirements. ————————————————————————————————————
2. The Definition of "Information Services" Establishes A Clear Boundary 7 -
3. Instant Messaging is Exempt From CALEA By the Inclusion of "Electronic Messaging" in the Definition of "Information Services." ————————————————————————————————————
4. The "Substantial Replacement" Provision of CALEA Supports Applying CALEA Requirements For Packet-Mode Services to the Telecommunications Carrier Providing A User Access to the Network10 -
Conclusion 12 -

Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of)	
)	
Communications Assistance for)	ET Docket No. 04-295
Law Enforcement Act and)	
Broadband Access and Services)	RM-10865

COMMENTS OF YAHOO! INC.

Serving hundreds of millions of users worldwide, Yahoo! is one of the Nation's leading application service providers (ASPs), offering consumers a full range of online products and services including Internet search capabilities and instant messaging (IM). Yahoo! is currently the number one Internet brand globally and is also the most trafficked Internet destination.

Introduction

Yahoo! files these comments in response to the Notice of Proposed Rulemaking and Declaratory Ruling (hereinafter "NPRM") issued by the Commission on August 9, 2004 in the above-referenced proceeding.¹ Issued in response to a Joint Petition filed on March 10, 2004, by the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively "law enforcement"),² the NPRM

¹ In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295 (Aug. 9, 2004) (hereinafter "NPRM").

² United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration, *Joint Petition for Expedited Rulemaking*, RM-10865 (Mar. 10, 2004) (hereinafter "*Joint Petition*").

recognizes that the Communications Assistance for Law Enforcement Act³ ("CALEA") was enacted in order to preserve the ability of law enforcement to conduct lawful electronic surveillance by requiring that telecommunications carriers modify their equipment to ensure they have the required surveillance capabilities.⁴ The Commission notes in the NPRM that two of its primary policy goals in this proceeding are to: 1) ensure that law enforcement agencies have all available resources authorized by CALEA, and 2) remove any and all uncertainty within the industry that is impeding CALEA compliance.⁵ Within this framework, the NPRM in part requested comment on the Commission's tentative conclusion that all facilities-based providers of broadband Internet access service are subject to CALEA because they provide a replacement for a substantial portion of the local telephone exchange service, and thus that such providers should be treated as "telecommunications carriers" under the statute.⁶

Congress intended CALEA to provide those law enforcement agencies with valid wiretap authority the technical capability to intercept electronic communications that are carried over common carrier networks. The Commission's approach, as proposed in the NPRM, of extending the current application of CALEA to include information services that are provided over broadband connections is in conflict with the plain language of CALEA. This proposed interpretation of CALEA is also broader than what is necessary to achieve the Commission's stated goal of covering broadband access providers. As a result, adoption of the approach proposed in the NPRM will ultimately fail to provide law

³ Pub. L. 103-414, 108 Stat. 4279 (1994), which is codified generally at 47 U.S.C. §§ 1001 et seq.

⁴ NPRM at \P 3.

⁵ *Id.* at ¶ 4.

⁶ NPRM at ¶ 37.

enforcement the surveillance capability it seeks and it will also increase rather than diminish the uncertainty presently facing industry and law enforcement about which providers and equipment must be CALEA compliant.

In particular, the NPRM ignores the specific exclusion for "information services" that Congress very deliberately included in the definition of "telecommunications carrier." As a result, it is highly unlikely that the Commission's approach, if adopted, would survive the inevitable legal challenge. As an alternative, Yahoo! proposes that the Commission instead pursue a legally defensible course by establishing a clear dividing line between the transmission services and facilities that are conceivably subject to CALEA obligations and the information services and facilities that are definitely not subject to CALEA. Congress took such an approach in drafting CALEA by specifically excluding "information services" from both the definition of "telecommunications carrier" and the assistance capability requirements of the statute. In addition to the statutory text, the legislative history of CALEA confirms that Congress expected the Commission to distinguish between the underlying transmission services and the information services that are provided over those transmission services. In fact, with respect to the Internet, Congress could not have been clearer when it stated that:

While this bill does not require reengineering of the Internet, nor does it propose prospectively functional requirements on the Internet, this does not mean that communications carried over the Internet are immune from interception or that the Internet offers a safe haven for illegal activity. Communications over the Internet are subject to interception under Title III just like other electronic communications.... The bill recognizes, however, that law enforcement will most likely intercept communications over the Internet at the same place it intercepts other electronic communications; at the carrier that provides access to the public switched network.⁷

⁷ H.R. Rep. 103-827(I) (1994), reprinted at 1994 U.S.C.C.A.N. 3489, at 3504-3505 (hereinafter "*House Report*").

What the Commission needs to do to achieve CALEA's objective, therefore, is conform its proposed solution to the "information services" / "telecommunications carrier" transmission approach adopted by Congress, rather than attempting to create unsupportable distinctions based on criteria not found in the statute. To do otherwise risks not only reversal in court, but also adoption of unintended and overbroad applications of the statute, by applying CALEA, for example, to "electronic messaging services" like Yahoo! instant messaging and other consumer software applications that enable computing devices under the control of users to communicate voice, video and data.

1. The Commission Must Determine What Services Are "Information Services" Under The Statute Before It Can Determine Who Is Subject To CALEA Requirements.

The structure of CALEA requires that the Commission must first determine whether a service is an information service before it can determine if CALEA's requirements apply. CALEA explicitly exempts "information services" from both the definition of "telecommunications carrier" and the assistance capability requirements of the statute. Therefore, regardless of whether or not the Commission finds that a person or entity is a "telecommunications carrier," if that person or entity's service is an information service, then CALEA does not apply to that service. As a result, before the Commission can determine whether a person or entity is a "telecommunications carrier"

_

- 4 -

⁸ 47 U.S.C. § 1001(4). *See* discussion of electronic messaging services" in part 3, *infra*.

⁹ See 47 U.S.C. § 1001(6) (definition of "information services"), 47 U.S.C. § 1001(8) (definition of "telecommunications carrier") and 47 U.S.C. § 1002(b)(2) (exemption for "information services").

subject to CALEA's requirements, it must first determine that such person or entity's service does not constitute "information services" as Congress defined that term in CALEA. The structure of the Act makes this requirement obvious. Congress determined that the term "telecommunications carrier"—

- (A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and
 - (B) includes—
 - (i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)); or
 - (ii) a person or entity engaged in the transmission or switching of wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such person a telecommunications carrier for purposes of this title; *but*
 - (C) does not include—
 - (i) persons or entities insofar as they are engaged in providing information services; and
 - (ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General. 10

Under the statutory criteria enacted by Congress, before CALEA can be applied to any service provided over the Internet, the Commission must first answer two questions. First, the Commission must determine where the transmission or switching service stops and where any exempt "information service" begins. Second, the Commission must determine whether the transmission or switching is being provided by either a "common carrier for hire" or by a person or entity whom it is in the public interest to deem a "telecommunications carrier" because such transmission or switching

¹⁰ 47 U.S.C. § 1001(8) (emphasis added).

is a "replacement for a substantial portion of local telephone exchange service." The Commission proposes in the NPRM to answer only the second question, and simply to ignore the first. The result of the Commission's proposed analysis is that the "information services" exclusion is effectively being written out of the statute. That is an approach that the statute will not allow because any entity, even one that is clearly providing transmission or switching as a common carrier for hire, is exempt from CALEA "insofar as they are engaged in providing information services." ¹³

Congress defined "information services" as a capability that is provided "via telecommunications." ¹⁴ Unless and until the Commission identifies the transmission component that by definition underlies every "information service," it is simply not possible, nor is it relevant, to determine whether the person or entity providing that transmission service is a "common carrier for hire," or if such transmission service is a

¹¹ 47 U.S.C. § 1001(8). Yahoo! notes that, in the cases of transmission or switching offered by a common carrier for hire, the Commission must also determine whether or not those telecommunications carrier services are nonetheless exempt because their sole purpose is the interconnection of other telecommunications carriers. *See* 47 U.S.C. § 1002(b)(2)(B). This exemption would clearly not apply to a service that is a replacement for a substantial portion of local telephone exchange service. However, as discussed further below, *see infra* note 31, this exemption does apply to transmission networks operated by many Internet services providers or application service providers like Yahoo!.

¹² NPRM at ¶ 50 ("We believe that the better reading of the statute is recognize and give full effect to CALEA's broader definition of 'telecommunications carrier' and to interpret the statute to mean that where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing an information service for purposes of CALEA.").

¹³ 47 U.S.C. § 1001(8)(C)(i). *See also* 47 U.S.C. § 1002(b)(2)(A) which exempts information services from the capability assistance requirements that telecommunications carriers must comply with under CALEA.

Although CALEA does not define "telecommunications," the meaning of the term was well known to the Congress, Department of Justice, the FCC, industry, and the courts from its pivotal role in the restrictions placed on the Bell Operating Companies in the Modification of Final Judgment. The MFJ defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission." *United States v. American Tel. and Tel. Co.*, 582 F. Supp. 131, 229 (1982). This definition clearly encompasses the "transmission or switching" at issue in CALEA's definition of "telecommunications carrier." 47 U.S.C. § 1001(8).

"replacement for a substantial portion of the local telephone exchange service." If, as the Commission has found in proceedings under the Communications Act, 15 the transmission component inherent in every information service is an inseparable part of that service under the definitions provided by Congress (a contention that neither the statutory language of CALEA nor the use of TCP/IP¹⁶ can logically support), then there is no transmission or switching to which the second question can be applied. The "information service" exclusion would apply to the entire service. The Commission found this to be an unsatisfactory result, and thus proposed to recognize the presence of switching or transmission services and ignore the "information services" exemption. The Because ignoring the exemption is not a legally defensible approach, the Commission must determine a logical, easily applicable boundary to give meaning to the statutory scheme established by Congress and thereby separate the exempt "information services" from the common carrier transmission and switching services to which CALEA applies.

2. The Definition of "Information Services" Establishes A Clear Boundary.

The Commission must look first to the statute to see if Congress has provided any guidance with respect to where to draw the boundary between the transmission and switching services subject to CALEA and the "information services" that Congress

¹⁵ See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Notice of Proposed Rulemaking, CC Docket 02-33 (Feb. 15, 2002); Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable and Other Facilities, Declaratory Ruling, CC Docket No. 02-52 (Mar. 15, 2002).

¹⁶ TCP/IP is shorthand for the "transmission control protocol / Internet protocol" suite of protocols that are used for communicating information over the Internet.

 $^{^{17}}$ NPRM at ¶ 50 (citing an "irreconcilable tension" between the substantial replacement provision and the information services exclusion). It is not the statute that is "irreconcilable;" rather it is the NPRM's proposed solution that is irreconcilable with the statute.

specifically exempted from those requirements. By defining "information services" in some detail, Congress has in fact provided such guidance. Section 102(6) states that the term "information services"—

- (A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and
 - (B) includes—
 - (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
 - (ii) electronic publishing; and
 - (iii) electronic messaging services; but
- (C) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network. ¹⁸

Section 102(4) of CALEA defines "electronic messaging services" as "software-based services that enable the sharing of data, images, sound, writing, or other information among computing devices controlled by the senders or recipients of the messages." While Congress did not define "telecommunications" or "electronic publishing," when CALEA was enacted in 1994, both terms were nonetheless familiar to the Department of Justice, the FCC, Congress, and the industry due to their extensive use in ongoing proceedings related to the 1982 Modification of Final Judgment that broke up AT&T.²⁰

That Congress intended that the common carrier transmission services of a person or entity that also provides information service would remain subject to CALEA is suggested by the fact that CALEA says that a telecommunications carrier, i.e., a person or entity engaged in transmission or switching as a common carrier for hire, is exempt from

¹⁸ 47 U.S.C. § 1001(6).

¹⁹ 47 U.S.C. § 1001(4). As discussed further below, "electronic messaging services" includes instant messaging (IM) services, even if the IM service includes voice or video capabilities.

²⁰ See United States v. American Tel. and Tel. Co., 582 F. Supp. 131 (1982).and subsequent proceedings.

CALEA obligations "insofar as they are engaged in providing information services."²¹ Since the definition of "information services" excludes manipulation of information by a telecommunications carrier (see section 102(6)(C)), ²² the language "insofar as" would have no meaning in the context of common carriers unless Congress intended that the "telecommunications" (i.e., transmission and switching) that underlie information services would remain subject to CALEA. As a result, the Commission must separately identify the transmission and information services components of any consumer offering in order to determine to which services and facilities, if any, CALEA requirements apply.

3. Instant Messaging is Exempt From CALEA By The Inclusion of "Electronic Messaging" in the Definition of "Information Services."

Yahoo! offers numerous information services that are not subject to CALEA.

Among these are email, chat rooms, message boards, and instant messaging. While the NPRM suggests that instant messaging, which can include voice services, will be exempt from CALEA under the Commission's approach, the rationale for this exemption is not clearly articulated.²³ CALEA is clear that instant messaging and other similar applications are exempt information services under the plain language of the statute.

Instant messaging (IM) is a service offered by Yahoo! and others that permits users to send text or voice messages instantaneously to other users of the service. The service is made possible through software that is downloaded onto each individual user's

22

²¹ 47 U.S.C. § 1001(8)(C)(i).

²² 47 U.S.C. § 1001(6)(C).

²³ See NPRM at n. 151 (stating that the *Joint Petition* "does not propose to apply CALEA to instant messaging or interactive game sessions.").

computer. This software, in conjunction with web servers operated by Yahoo!, provides users the capability to engage in communications sessions that include the real-time exchange of text and voice messages, images and graphics, video streams, and computer files. These communications sessions can take place in isolation or in conjunction with game playing, web browsing, or other online activity. The definition of "electronic messaging services" in CALEA functionally describes IM services like those offered by Yahoo!, and also includes voice-over IM and voice-enabled gaming devices. As a result, the "information services" exclusion in sections 102(8)(C) and 103(b)(2)(A)²⁶ of CALEA make clear that these types of services do not have to be designed to be CALEA compliant. However, as noted in the *House Report* and discussed above, ²⁷ law enforcement will still have access to the content of IM messages or other electronic messaging services under CALEA during their transmission by a telecommunications carrier.

4. The "Substantial Replacement" Provision Of CALEA Supports Applying CALEA Requirements For Packet-Mode Services To The Telecommunications Carrier Providing A User Access To The Network.

The plain language of the "substantial replacement" provision of CALEA, section 102(8)(B)(ii), limits its application to persons or entities that provide a user access to the Internet. For this section of CALEA to apply, the Commission must find that the service

²⁴ 47 U.S.C. § 1001(4).

²⁵ The Commission appears to have reached the same conclusion. *See* NPRM at n. 151 ("Indeed, Congress has spoken that these services are excluded from CALEA.").

²⁶ 47 U.S.C. §§ 1001(8)(C) and 1002(b)(2)(A).

²⁷ See supra, note 7.

being provided is a "replacement for a substantial portion of the *local* telephone exchange service." Yahoo! agrees with the Commission that this phrase should be interpreted to include only those parties who are engaged in providing a user the underlying transmission, or "access conduit," peeded to connect to the Internet or other communications services. Particularly in the packet-mode context, where individual parts of a particular communication take diverse paths through a network to reach the intended destination, applying CALEA's capability requirements to equipment, facilities, and services beyond those used to originate or terminate a user's connection to the communications network is neither workable nor within the scope of the plain language of the statute. In the case of an application service provider like Yahoo!, which does not provide the underlying transmission service used to connect to the network and, to the extent it provides transmission at all, only interconnects telecommunications carrier networks. CALEA requirements clearly do not apply. 10 per 10

²⁸ 47 U.S.C. § 1001(8)(B)(ii) (emphasis added).

²⁹ NPRM at ¶ 44.

³⁰ See NPRM at ¶¶ 43-44.

³¹ In addition to the fact that Yahoo! and other similar ASPs do not provide the underlying transmission used for narrowband or broadband Internet access, section 103(b)(2)(B) of CALEA explicitly exempts "equipment, facilities, or services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers." 47 U.S.C. § 1002(b)(2)(B). In the transmission and switching context, the "sole purpose" of any Yahoo! communications network is to carry traffic to and from the networks of telecommunications carriers so that users of those telecommunications carriers can reach the information services provided by Yahoo!.

Conclusion

CALEA is not limited by its terms to particular technologies, and the Commission has held in previous orders implementing CALEA that the statute is technologically neutral.³² In light of this, it would be in conflict with the statute for the Commission to announce that particular types of communications are exempt based on the specific protocols, management interactions, or technologies that different types of communications employ.

In order to provide greater certainty to both law enforcement and industry, Yahoo! urges the Commission to instead to follow the clear direction from Congress and apply CALEA equally to equipment, facilities, and services based on the functionality provided to the user. Congress chose to exempt "information services" from CALEA, while ensuring that the content of information services could continue to be lawfully intercepted by attaching CALEA requirements to the underlying common carrier transmission capabilities used by information services. By clearly establishing the dividing line between information services and the underlying telecommunications services and equipment to which CALEA obligations may apply, the Commission can accomplish the purposes set forth by Congress without resorting to technologically or legally unsupportable approaches.

³² See NPRM at \P 33.

Respectfully submitted,

/s/ Earl W. Comstock

John W. Butler Earl W. Comstock Robert K. Magovern SHER & BLACKWELL LLP 1850 M Street, N.W. Suite 900 Washington, DC 20036 (202) 463-2500

John Scheibel Vice President Public Policy Yahoo! Inc. 2000 Pennsylvania Avenue NW, 4th Floor Washington, D.C. 20006 (202) 887-6932

November 8, 2004